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No. 153

IN THE

Supreme Court of the United States

October Term, 1960

FRANK R. COPPOLA,

Petitioner,

v.

UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR THE PETITIONER

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Opinions Below

The original majority and dissenting opinions of the Court of Appeals, dated July 20, 1959, reversing both judgments of conviction, appear at pages 267-280 of the Transcript of Record. A re-hearing *en banc* was granted (Tr. 283) and upon re-argument these opinions were withdrawn (Tr. 307, 321).

The majority and dissenting opinions of the Court of Appeals are reported at 281 F. (2d) 340.

Jurisdiction

The judgments of the Court of Appeals were entered on May 20, 1960 (Tr. 308, 322). The petition for Writs of Certiorari was filed on June 17, 1960 and was granted on October 10, 1960 (Tr. 323). The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

Questions Presented

Whether, under the rule of *Anderson v. U. S.*, 318 U. S. 350; 63 S. Ct. 599, the confessions, oral and written, secured by Federal agents from petitioner were obtained under such a "working arrangement" between local and Federal officers as would make them inadmissible in evidence against petitioner.

or

Whether, even in the absence of such a "working arrangement", such confessions are nevertheless inadmissible against petitioner because they were secured during a protracted illegal detention of petitioner by State authorities, following an illegal arrest.

Statutes Involved

Rule 5. Proceedings before the Commissioner.

"(a) Appearance before the Commissioner.

An officer making an arrest under a warrant issued upon a complaint or any person making an arrest without a warrant shall take the arrested person without unnecessary delay before the nearest available commissioner or before any other nearby officer empowered to commit persons charged with offenses against the laws of the United States. When a person arrested without a warrant is brought before a com-

missioner or other officer, a complaint shall be filed forthwith."

Section 2113 of the United States Code, *Crimes and Criminal Procedure*, Title 18, so far as pertinent, provides:

"§ 2113. Bank robbery and incidental crimes

(a) Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, or any savings and loan association; or

Whoever enters or attempts to enter any bank, or any savings and loan association, or any building used in whole or in part as a bank, or as a savings and loan association, with intent to commit in such bank, or in such savings and loan association, or building, or part thereof, so used, any felony affecting such bank or such savings and loan association and in violation of any statute of the United States, or any larceny—

Shall be fined not more than $5,000 or imprisoned not more than twenty years, or both.

(b) Whoever takes and carries away, with intent to steal or purloin any property or money or any other thing of value exceeding $100 belonging to, or in the care, custody, control, management, or possession of any bank, or any savings and loan association, shall be fined not more than $5,000 or imprisoned not more than ten years, or both;".

Statement

On July 11, 1957, petitioner was convicted in the United States District Court for the Western District of New York, following a jury trial, of robbing a branch bank of the Manufacturers and Traders Trust Company, a member bank of the Federal Reserve System, in violation of

18 U. S. C. 2113(a) (Tr. 1-2, 177-178). On December 2, 1957, following a separate jury trial in the same court, he was convicted of aiding and abetting the robbery of a branch of the Liberty Bank of Buffalo, likewise a member bank of the Federal Reserve System (Tr. 179-182, 266-267). For each offense he was sentenced to 20 years' imprisonment, the terms to run consecutively (Tr. 177-178, 266-267). On appeal, a three-judge panel reversed (one judge dissenting)* both convictions on the ground that confessions to the offenses by petitioner, made to agents of the Federal Bureau of Investigation while he was in the custody of the city police of Buffalo, New York, had been improperly received in evidence under the rule of *Anderson v. United States*, 318 U. S. 350, in which this Court applied the rationale of *McNabb v. United States*, 318 U. S. 332, to the particular factual situation there involved (Tr. 267-281, 309-319). On motion of the government, a rehearing *en banc* was ordered, and, on May 20, 1960, the *en banc* court, dividing three to two,** sustained the convictions (Tr. 281-282, 308, 322).

Both cases present the same issue. The relevant facts (adduced in each case at a hearing held out of the presence of the jury) may be summarized as follows:

First Case: M and T Bank robbery—February 15, 1956:

On February 15, 1956, the Clinton-Bailey Branch of the Manufacturers and Traders Trust Company in Buffalo, New York was held up by two men. The men es-

* The majority consisted of Judges Waterman and Washington (the latter, a regular member of the Court of Appeals for the District of Columbia Circuit, sitting by designation). Judge Moore dissented.

** Judge Moore wrote the majority opinion, in which Chief Judge Lumbard and Judge Friendly concurred. Judges Waterman and Clark dissented.

caped with approximately $52,529.00 of United States currency. This bank was insured by the Federal Deposit Insurance Company.

On or about February 25th or 27th, 1956, the defendant Coppola was brought to the Manufacturers and Traders Trust Company by agents of the Federal Bureau of Investigation for the purpose of having the events of the holdup re-enacted. This was pursuant to a pre-arrangement between Albert J. Eger, branch manager of the Clinton-Bailey branch of the bank, and members of the F.B.I. The defendant Coppola put on a stocking mask and the F.B.I. agents gave him instructions as to what he was to do. He approached the branch bank manager, then proceeded towards the work cages, followed by F.B.I. agents; that he was back of the cages for three or four minutes and then retraced his steps to the manager's desk and then went into the hallway of the bank (Tr. 4-6).

No arrest was made of the defendant after the re-enactment of the holdup, charging him with being one of the participants in the same.

On January 7, 1957, approximately eleven (11) months after the re-enactment of the holdup, John F. Roche, Special Agent of the F. B. I. in Buffalo, New York, contacted John Golombeck, Chief of Detectives of the Buffalo Police Department, as to information concerning an alleged unsolved crime outside the jurisdiction of the Federal authorities (Tr. 106-107). Again on January 9, 1957 Agent Roche contacted Golombeck, Chief of Detectives, and relayed to him information concerning a contemplated holdup. On January 10, 1957 Agent Roche received a telephone call from Golombeck to the effect that "the defendant Coppola and others had been *arrested* and they

were on their way to police headquarters with them" (Tr. 107-108). Agent Roche informed the Erie County District Attorney, Dwyer, of the same information on January 9, 1957 and, in addition, told the said Dwyer that the defendant was being investigated by the F. B. I. in connection with the robbery of the Manufacturers and Traders Trust Company (Tr. 108).

On January 10, 1957, Agent Roche went to Buffalo Police Headquarters *shortly before noon;* that he saw Chief Golombeck, District Attorney Dwyer, and Detective Klenk and had lunch with them (Tr. 113); that he returned to police headquarters at 2:30 P. M. with District Attorney Dwyer, and at 3:30 P. M. saw the defendant in the cell block and questioned him about the M & T bank robbery (Tr. 109); that shortly before 9:00 P. M. on the same day he assigned Special Agents Eddy and Jenson to interview Coppola; Agents Moulin and Jenkins to interview D'Antuono, and Agents Obuhanick and Liddy to interview Simmons (Tr. 110).

Agent Roche further testified that he and other F. B. I. agents were investigating the robbery of the Clinton-Bailey branch of the Manufacturers and Traders Trust Company from February 15, 1956 up to and including *January 7, 1957;* that the F. B. I. worked very closely with the Buffalo Police Department in this particular investigation (Tr. 112); that if he had information they wanted to work on mutually they would assign a detective and an agent to work together on it (Tr. 113).

Agent Roche expected a call from Detective Chief Golombeck if anything developed (Tr. 115-116). That defendants, after arraignment in City Court, were turned over to Federal authorities around four (4) o'clock on

January 11, 1957, and were arraigned before Commissioner Butterfield (Tr. 111).

On January 10, 1957, the defendant and others were arrested and taken to police headquarters where they were lodged in cells and no charge was placed against defendant during the entire day (Tr. 75-78). On January 11, 1957 a charge was placed against the defendant at 1:00 P. M. and defendant was arraigned in the City Court of Buffalo on January 11, 1957 at approximately 2:00 P. M. There was no warrant for the arrest of the defendant prior to 2:00 P. M. on January 11, 1957. It was conceded that defendant had been arrested and held on *suspicion* from 10:00 o'clock on the morning of January 10, 1957 until ten minutes to one o'clock in the afternoon of January 11, 1957 (Tr. 80-81). That at about 10:00 o'clock on January 11, 1957 the F. B. I. requested custody of defendant and others. There was no compliance with this request. After arraignment in the City Court of Buffalo the defendant was delivered into the custody of Mr. Henderson, United States Attorney (Tr. 85-86).

Detective Klenk identified Government's Exhibit 41, and the same was marked in evidence. This was the daily memoranda of arrests used in the Buffalo Police Department to record the time a person is brought in, his name, age, the charge, the arresting officers, and the final disposition (Tr. 83). That the time of day recorded on Exhibit 41 as to defendant Coppola, namely 3:45 P. M. and 4:15 P. M., indicated the time that the defendant was brought down to the cell block and officially put on the memoranda of arrests in the afternoon of that day (Tr. 89-91).

That the charges of 2124 and 404 of the Penal Law were made on Exhibit 41 on January 11, 1957 and the desig-

nation of 3:45 and 4:15 P. M. on Exhibit 41 did not indicate the time that such charges were made against the defendant (Tr. 92).

Klenk further testified that on January 10, 1957, between the hours of 9:00 P. M. and 12:30 A. M., he went to the cell block to question defendant. That each time members of the F. B. I. were questioning him. That he refrained from questioning defendant because of the policy of courtesy extended to officers of the F. B. I. and other law-enforcing agencies (Tr. 88-89).

John C. Golombeck, Chief of Detectives, Buffalo Police Department, testified that he received information from F. B. I. Agent Roche on January 7th, 9th and 10th, 1957. That on January 10, 1957 he was in a car with Detectives Klenk and Segit; that the car in which defendant was riding was directed to pull over, *on suspicion;* that no crime was being committed at that time (Tr. 93-95). That defendant and others were taken to police headquarters and to circumvent the press and the taking of pictures the defendant and others were taken to the fourth floor and placed in a cell block.

He testified that he placed a charge against Coppola on the afternoon of January 10, 1957 around 3:30 or 4:00 o'clock; that he did not make the notation on Exhibit 41 as to the time; that he was pretty sure that his relief man placed the time (Tr. 97-98).

When his attention was called to the fact that there was testimony that the time on Exhibit 41 represented the time that defendant was brought from the cell block to the detective bureau he said, "Well, then, it must be so" (Tr. 99).

He called F. B. I. Agent Roche to let him know he apprehended defendant and others; that his department works hand in hand with the F. B. I. (Tr. 102).

In the afternoon of January 10, 1957 he saw several F. B. I. agents in Buffalo Police Headquarters, and again at night on the same day he saw a number of F. B. I. agents there; that in the evening he couldn't interrupt the F. B. I. agents who were questioning defendant, although he remained at headquarters until 12:30 A. M. (Tr. 96, 98).

Elmer F. Moulin, an F. B. I. agent, went to police headquarters in Buffalo just prior to 8:00 P. M. and was there until midnight. He was accompanied by another agent, Frank Jenkins. He saw other members of the F. B. I. there including Messrs. Eddy, Jenson, Obuhanick, Liddy and Roche (Tr. 102-104).

Robert Gordon Eddy, Special Agent of the F. B. I., testified that he learned at about noon of January 10, 1957 that Coppola had been taken into custody by the Buffalo Police Department on that day. That he and Agent Jenson went to the Buffalo Police Headquarters about 8:00 P. M. of the same day (Tr. 15); that at headquarters there were five other agents and Mr. Roche; that a show-up was in progress when he arrived; that at about 9:00 P. M. defendant was brought out and he and Agent Jenson interviewed defendant until shortly after 12:45 A. M. on January 11, 1957 (Tr. 16-18). That the office wherein he questioned defendant was barricaded and he could see other agents in another room interviewing others (Tr. 18); that he knew defendant was arraigned on January 11, 1957; that he did not place any charge against defendant; that he had no warrant for defendant's arrest (Tr. 20-21).

Upon being recalled the next day by the Government he testified that the defendant made no complaints about lack

of food or drink; he didn't say he was mentally or physically tired and didn't appear to be nervous or afraid; that the interview commenced at 9:04 P. M. and at 9:41 the defendant started to tell Agent Eddy about crimes he was involved in; that during the interview District Attorney Dwyer came into the room and also Special Agent Roche and Agent Jenkins came to the door of the room where the questioning was being conducted (Tr. 31-33). At 11:37 P. M. he started the statement (Government's Exhibit 43) and at this juncture he was not again advised orally of his rights. That between 9:02 and 9:41 P. M. the agents told defendant of some of the evidence they had developed (Tr. 34, 35); that they asked defendant the part that his wife and mother had in the Manufacturers and Traders Trust Company robbery and they couldn't answer his questions as to whether the agents intended to arrest his wife and mother (Tr. 38-39); that Agent Eddy prepared the first two paragraphs of Exhibit 43 and defendant dictated the balance (Tr. 41).

Agent Jenson's testimony substantially corroborated Mr. Eddy (Tr. 42-49). He testified that there was a short discussion about defendant's mother and wife being involved and if he was assured that they would not be prosecuted he would sign a statement (Tr. 48).

On the preliminary hearing, without the jury's presence, the petitioner testified that on January 10, 1957 at about 10:00 A. M., he was in an automobile on Clinton Street in the City of Buffalo, New York when a shotgun was pointed at him and he and others were told to "stick up their hands". He was taken to Buffalo Police Headquarters and put in a cell. He asked for food and was told, "This isn't a cafeteria, we didn't ask you to come up here" (Tr. 50-51). He was interrogated throughout the day as well

as being placed in a "lineup" on several occasions. He asked to use the telephone, and this request was denied. He asked to call his lawyer and the response was, "Where do you think you are, in a hotel?" He was further told, "Well, we don't feed around here." Later, he gave money for food and received a tunafish sandwich which he had to throw away. They gave him milk and then took it from him. He again asked for food, at nighttime, and was told "they didn't serve meals up there" (Tr. 51-56).

He testified that Agent Eddy, who had interrogated him a year previously, and Jenson had him brought into the office of the cell block at police headquarters about 8:00 or 8:30 P. M. Eddy told the defendant that his mother and wife were in a Niagara Falls jail. He asked to see the United States Attorney and a Federal Judge, both of which requests were denied (Tr. 56-57). They told the defendant several times that if he signed a statement they would recommend that the case against his mother and wife be dropped (Tr. 58-60). Agent Eddy prepared a statement; the defendant repeatedly told him he knew of no facts (Tr. 60-61); that up to the time of signing the statement he had no food or drink. He made the statement involuntarily because he was told his mother and wife were suffering and he was advised by the F. B. I. that the only way they could be released was to give a statement (Tr. 61-62).

On cross examination he testified that he made requests for a lawyer to Agents Eddy and Roche, Detective Chief Colombeck, Detective Klenk, the turnkey, and several other officers (Tr. 66).

At the conclusion of such testimony the Court stated that it would not hold that the confession was involuntary as a matter of law but would submit such question to the jury

as a question of fact (Tr. 122). Also, the Court held as a matter of law that there was no unusual delay in the arraignment of defendant (Tr. 120-121, 160). The Court also refused to submit the question of the unreasonableness of the delay to the jury as a question of fact (Tr. 160).

Upon resumption of trial before Court and jury, Agent Eddy testified as to the conversation he had with petitioner on the evening of January 10, 1957 shortly after 9:00 P. M. and continuing until 12:54 A. M. on the following morning. He also testified as to the preparation of a statement and the signing of the same by petitioner. This statement (Exhibit 43) was received in evidence over petitioner's objection (Tr. 123-132).

On cross examination, Agent Eddy admitted he was conversant with the detail of the robbery of the M & T Trust Company since February 15, 1956; that he learned of such details from employees of the bank (Tr. 134-137). Further, he admitted that in his conversation with petitioner he was telling petitioner of facts that he had learned from outside sources (Tr. 150). He never charged petitioner with any violation relative to the robbery of the M & T Trust Company; he never demanded that petitioner be released into his custody (Tr. 156).

Second Case: Liberty Bank robbery—October 2, 1956:

On October 2, 1956 three (3) men entered the Linwood-North Branch of the Liberty Bank of Buffalo and proceeded to stage a robbery of the said bank to the extent of $23,775.10 in United States currency. The men escaped with the assistance of an automobile driven by a fourth man who waited outside the bank. Between January 1, 1957 and January 10, 1957 John A. Roche, Special Agent in charge of the Buffalo office of the F. B. I., was conversant

with the facts surrounding the aforesaid bank holdup on October 2, 1956 and also all the statements made in November and December 1956 concerning such holdup, including those of William Buyers III, a deputy sheriff (Tr. 230-231).

The indictment against the petitioner, *et al.*, relating to the above crime was tried approximately six (6) months subsequent to the first case (Tr. 182).

A preliminary hearing was held by the Trial Court, without the presence of the jury, and the same members of the F. B. I. and the Buffalo police who had testified at the first trial testified on such hearing. The evidence produced was substantially the same as was produced at the first trial (Tr. 186-236). Motions to suppress the oral and written admissions of pet tioner on the basis of unreasonable delay in arraignment and involuntariness were denied by the Court (Tr. 237-238). The Court not only held that as a matter of law there was no delay in arraignment of petitioner, but upon request from the Government it also found *as a matter of fact* that there was no working agreement between the F. B. I. and the Buffalo police with respect to the arrest and detention of petitioner (Tr. 238).

Summary of Argument

In each of the within cases, the Trial Court conducted a hearing without the presence of the jury to determine whether or not the oral statement and written statement (Government's Exhibit 43), given by the petitioner, Coppola, to the agents of the Federal Bureau of Investigation while he was in the physical custody of the State authorities, had been extracted from Coppola in violation of his right under Rule 5(a) of the Rules of Criminal Procedure

and the principle set forth in *McNabb v. United States*, 318 U. S. 332 and *Anderson v. United States*, 318 U. S. 350.

At the conclusion of each hearing, the Trial Court ruled as a matter of law that there had been no reasonable delay in arraigning the petitioner on the Federal charges as would make the statements of the petitioner inadmissible in evidence against him (Tr. 120-121, 237-238). It is the petitioner's argument that upon the facts adduced at the hearings, these rulings deprived the petitioner of a fair trial and, therefore, constituted reversible error.

Petitioner further urges that even if the facts in the record fail to disclose the existence of a so-called working arrangement between the Federal and local authorities, petitioner's confessions should, nevertheless, be held inadmissible against him under an extension of the *McNabb* and *Anderson* rules which would make any confession obtained by Federal agents from a defendant while he was being illegally detained without arraignment by State officials, inadmissible in evidence in Federal prosecutions.

ARGUMENT

POINT I

The Court erred in ruling as a matter of law that there was no unusual delay in arraignment of petitioner before the U. S. Commissioner as would render inadmissible the testimony of Special Agents Eddy and Jenson of the Federal Bureau of Investigation or the written statement secured from petitioner during his illegal detention. The admission of the incriminating oral and written statements in evidence was error which deprived petitioner of a fair trial under the principles of Anderson v. U. S., 318 U. S. 350; 63 S. Ct. 599.

In *Anderson v. United States*, 318 U. S. 350, this Court enunciated a rule that evidence improperly secured by a Federal officer, through collaboration with State officers, is inadmissible in a trial in the Federal Courts. We contend that such decision, and the rationale expressed therein, is controlling as to our present case. Three appellate judges below have agreed with petitioner's contention and three judges have disagreed.

There is no material difference between the facts of the *Anderson* case and those of our present case, with one exception. The exception in our present case fortifies the petitioner's contention and arises from the fact that the F. B. I., in its investigation of the M & T bank robbery which occurred on February 15, 1956, took the petitioner into custody as early as February 25th or 27th, 1956. The agents escorted the petitioner to the M & T bank, the *situs* of the robbery. There they gave petitioner instructions as to what he was to do in re-enacting the robbery, as understood by the agents (Tr. 5-6). No arrest was made of peti-

tioner after the directed re-enactment of the said crime, and he was released from Federal custody.

In the *Anderson* case, the Sheriff of Polk County, Tennessee, and the agents of the F. B. I. were attempting to solve a crime relating to the dynamiting of the towers and power lines owned by the TVA. Such action was a violation of both State and Federal law. The record in such case suggests that the Sheriff, his agents, as well as the F. B. I. agents, jointly questioned the suspects and that Federal agents and Sheriff's deputies brought in suspects for questioning. However, this proof was denied by the Sheriff, his deputies, and the F. B. I. agent (*Anderson v. U. S.*, 124 F. 2d 58, at p. 67). Finally it was conceded that the petitioners' detention by State officers violated the statutes of Tennessee to the effect that "no person can be committed to prison for any criminal matter until examination thereof be first had before some magistrate".

A

Working Arrangement Between F. B. I. and Buffalo Police Between February 15, 1956 and January 10, 1957 in Investigation of M & T Bank Robbery.

Our present record reveals that the F. B. I. agents and local officers of the Buffalo Police Department were collaborating for months prior to petitioner's illegal arrest on January 10, 1957, in attempting to solve the M & T bank robbery (Tr. 112-113). Not only did the Federal Agent in Charge, Roche, testify that he and his agents co-operated in the investigation of the M & T bank robbery, but he also stated that the Federal agents and the local police worked the case mutually (Tr. 112). These admissions, on the trial, were so damaging to the Government's claim of lack of collaboration that it caused the Trial Judge to exclaim:

"The Court: What are you saying?" (Tr. 112).

Subsequent to the aforesaid query by the Trial Court, the following question was asked of and the answer made by Federal Agent Roche:

> "Q. What was the type of your contact then?
> A. If we had any information we wanted to work on mutually we would work with the detectives and we would assign a detective and an agent together to work it out" (Tr. 113).

There does not appear to be any doubt that when Agent Roche stated that the bureau of the Buffalo Police Department and his Federal agents worked the case *mutually*, he meant to convey to the Court that the Federal officers and the local police were interchanging and reciprocating on any and all information that was received by the Federal agents or the local police officers. Such an arrangement could spell out but one conclusion, namely, that there was a "working arrangement" between the Federal and local officers in the investigation of the M & T bank robbery. If there remained a scintilla of doubt as to such "working arrangement" between Federal and local officers, it surely must be eradicated when Agent Roche stated that in addition to working on information *mutually* "we would assign a detective and an agent to work it out" (Tr. 113). There is but one deduction to be drawn from the latter admission, namely, that by "we" he meant himself as agent in charge of the F. B. I., his agents, and the higher echelon of the Buffalo Police Department; that they, in collaboration with one another, assigned detectives and agents to work out the information received from their reciprocal understanding.

Further evidence of a "working arrangement" between Federal agents and local police is demonstrated in the testimony of John C. Golombeck, Chief of Detectives of the Buffalo Police Department. After stating that on

January 10, 1957 he had called Agent in Charge Roche to inform him of the arrest of petitioner and others, in answer to a question concerning courtesy and co-operation between his department and the F. B. I., he stated:

> "A. That's right. We work hand in hand with them and the Sheriff's office" (Tr. 102).

The Court's attention is directed to the fact that the foregoing not only substantiates the petitioner's contention as to the "working arrangement" between the F. B. I. and local police in relation to the M & T bank robbery investigation from February 16, 1956 to January 9, 1957, but, as will be seen, that such working arrangement continued on January 10, 1957 and the early morning of January 11, 1957.

B

The Working Arrangement Between the F. B. I. and Buffalo Police Was a Continuous Arrangement and Was Pursued Up To and Including January 10th and 11th, 1957.

It has been demonstrated that the F. B. I. were investigating the M & T bank robbery from February 15, 1956 to January 7, 1957 and that during such period there was a "working arrangement" with Buffalo police officers (Tr. 112-113).

On January 7, 1957 Federal Agent Roche contacted John Golombeck and gave to him certain information relative to an alleged robbery of one Paul ..... (Last name unknown). Golombeck informed Roche that he had a record of a hold-up of one Paul Redlinski. Roche then furnished the Chief of Detectives with photographs of petitioner and two others, and Redlinski identified the petitioner (Tr. 106, 107). Again on January 9, 1957, Federal Agent Roche contacted the Chief of Detectives and stated that he had

information that petitioner and two others contemplated a hold-up in East Buffalo, which was to occur on January 10, 1957 (Tr. 107).

In spite of the information forwarded by Roche to Golombeck on January 7, 1957 and the further proof that Redlinski had identified the petitioner's photograph, no arrest of petitioner was made by the local police for such alleged crime until 1:00 P. M. on January 11, 1957 (Tr. 80). The only arrest made of petitioner by Golombeck was on January 10, 1957 and such arrest was made on *suspicion* (Tr. 95), and the subsequent detention was on *suspicion* (Tr. 98).

The "working arrangement" between Federal and State officers, relative to the M & T bank robbery, was a continuing operation, conceived in early 1956 and was operative between January 7 and January 11, 1957. The Government, if it remains consistent with its contention in the Courts below, will concede that there was close collaboration between Federal and local officers in attempting to solve the M & T bank robbery. However, it asserts that such does not support a deduction that there was a "working arrangement" between the F. B. I. and local officers in detaining petitioner and interrogating him concerning his part in such crime. The answer to the Government's position is found in the record:

Between January 7th and 10th, 1957 the petitioner was not only a *suspect* relative to the M & T bank robbery and the Liberty Bank robbery, but this fact was transmitted to Mr. Dwyer, the State district attorney, by Federal Agent Roche (Tr. 108).

On January 10, 1957, after petitioner's arrest based upon information supplied by the F. B. I., but before he was taken to local police headquarters, Chief of Detectives

Golombeck telephoned Roche, at about 11:00 A. M. and informed the latter that he had arrested petitioner and two other persons and that they were on their way to headquarters (Tr. 108). We must bear in mind that the information given by the F. B. I. to Golombeck on January 9, 1957 did not concern itself with Federal matters and that Roche claimed he didn't ask the local police to do anything (Tr. 116). In spite of the lack of any request by Roche, the record not only shows that Roche was expecting a call from Golombeck on January 10, 1957 but that his expectation of such a call was based on "if anything had developed" (Tr. 115, 116). The sole and only developments that Roche was interested in were the arrest of petitioner, the locale of his detention and the opportunity to query the petitioner while in the custody of the local police. It does not seem plausible that he was interested in any violation of New York State law.

Upon receipt of the aforementioned telephone call from Golombeck, Agent Roche, interested only in bank robberies, went over to local police headquarters shortly before noon, at which time he saw Golombeck, District Attorney Dwyer and Lieutenant Klenk, the latter being one of the officers who arrested petitioner (Tr. 108, 109). The purpose of his visit was to learn whether or not anything had developed concerning the M & T bank robbery, the Liberty Bank robbery or the Seneca-Emslie branch of the Marine Trust. Roche conceded that his inquiries of Golombeck, Klenk and Dwyer were concerning bank stickups (Tr. 113-114). Such inquiries by a Federal officer of three "local" officers provides a substantial basis for the petitioner's contention that the local officers were to carry out the "working arrangement" and develop from petitioner, by interrogation, any facts relating to the bank robberies then

under investigation by the F. B. I. Further, another reason for the early visit of Roche to police headquarters was to confer as to the status of the petitioner at that time; the intentions of the local police as to the length of petitioner's detention, and the time when and the manner in which the questioning by the F. B. I. could be undertaken. In view of Rule 5a of the Federal Rules of Criminal Procedure, as well as Section 165 of the New York Criminal Code, the Federal agents knew that if they took custody of the petitioner it would be necessary to arraign him the same afternoon, whereas the local police enjoyed a more liberal application of the State provision. Such reasoning may be characterized as surmise or conjecture. It is submitted, however, that, excluding naiveness, the deduction drawn is amply supported by Roche's immediate appearance at local headquarters and the collaboration between Roche and the three "local" officers.

At this stage, Roche, the Federal agent, Chief of Detectives Goldmbeck, Lieutenant Harry Klenk (arresting officers of petitioner) and District Attorney Dwyer went to lunch together (Tr. 113); that this luncheon lasted until 2:30 P. M. when Roche, and at least Klenk and Dwyer, returned to local police headquarters where petitioner was being illegally detained (Tr. 114). At 2:30 P. M. Lieutenant Klenk, of the Buffalo Police, began interrogating the petitioner and among the subjects of such interrogation was questioning as to a bank hold-up in the North End and of the Market Bank out on Clinton Street (Tr. 84, 85)*. At 3:30 P. M. Roche and Dwyer, jointly, interrogated the petitioner about the M & T bank robbery, and other crimes, and endeavored to secure petitioner's consent to a search of his home (Tr. 109). Again it would strain credulity for

* The "Market Bank out on Clinton Street" had reference to the M & T Trust Company, the victim of the robbery of February 15, 1956.

an assertion to be made by the Government that the procedure to be followed as to detention and interrogation of the petitioner was not, at least in part, the subject of discussion at such luncheon. The only plausible reason for the luncheon, other than that heretofore expressed, would be one of sociability. Assuming that such an assertion were made, it would not follow that the future procedural aspects of the detention and interrogation of the petitioner were not discussed. The interrogation of the petitioner by Klenk, immediately after the return from lunch, on the subject of the M & T bank robbery, followed by further interrogation by Roche on the same subject-matter, in the presence of Dwyer, supports the petitioner's contention that the "working arrangement" between Federal and State officers was operating at such times.

Roche, a qualified agent in charge of the Buffalo office of the F. B. I., had certainly come into possession of information from local officers Golombeck and Klenk that the petitioner had committed no crime in their presence. He must have learned that petitioner was being held on suspicion. Added to such factors, it was known by Roche subsequent to his interrogation of petitioner that the business hours of the City Court of Buffalo, for arraignment of petitioner, had expired and petitioner was still being held illegally. There was no impediment to the plans which he put into effect by assigning Agents Eddy and Jenson at 8:00 P. M. to interview the petitioner (Tr. 15). The oral and written statement of petitioner was obtained from him as the result of interrogation by Federal Agents Eddy and Jenson between the hours of 9:00 P. M. on January 10, 1957 and 12:45 A. M. on January 11, 1957, during an illegal detention.

In addition to the close collaboration of local police and Federal Agent Roche throughout the daytime, a further

significant factor occurred during the hours of 9:00 P. M. on January 10, 1957 and 12:30 A. M. on January 11, 1957. During these hours petitioner, according to the Government's contention, was being detained solely by the "local" police. However, the actual custody of petitioner during the aforesaid hours was exclusively that of the Federal officers. In fact, it was so exclusive that Klenk, the local officer, during those hours went to local headquarters to interview petitioner. He endeavored on three (3) occasions to interrogate petitioner. Klenk's reaction on those occasions is best expressed in his own words:

> "* * * when I went upstairs as long as they were talking to them I wouldn't step in and tell them I wanted to talk to them" (Tr. 88).

Such conduct on the part of the "local" police certainly dispels the expression of the majority below:

> "The custody of the defendants after arrest was *exclusively* that of the Buffalo police, as well as their interrogation" (Tr. 290).

The petitioner submits that the development of the above facts demonstrates the existence of and the carrying out of a "working arrangement" between Federal and local officers and substantiates the application of the rationale expressed in *Anderson v. United States* at page 356:

> "* * * There was a working arrangement between the federal officers and the sheriff of Polk County which made possible the abuses revealed by this record. Therefore, the fact that the federal officers themselves were not formally guilty of illegal conduct does not affect the admissibility of the evidence which they secured improperly through collaboration with state officers. Gambino v. United States, 275 U. S. 310, 314, 48 S. Ct. 137, 72 L. Ed. 293, 52 A. L. R. 1381; Byars v. United States, 273 U. S. 28, 33, 34, 47 S. Ct. 248, 71 L. Ed. 520."

Although in *Lustig v. United States*, 338 U. S. 74, this Court concerned itself with the question of Federal par-

tic[illegible]ation in an unlawful search and seizure by State officers, the principle involved is the same and it is difficult to distinguish the facts in that case from those of the instant case.

In the *Lustig* case, Green, a Federal officer, contacted the Camden, New Jersey police department and imparted to them certain information as in the present case Roche contacted the Buffalo police officials. Green thereafter was notified by the police of the search and went to the hotel, whereas Roche was notified by the Buffalo police and went to police headquarters. Green did not request the search of the hotel room; nor did Roche verbally request the arrest of petitioner. However, after the inception of the search by state officers, Green joined in the same, as Roche joined the local police officers after the arrest and during the illegal detention. Both were participants in collaborating in an illegal enterprise, and evidence obtained under such circumstances is inadmissible.

In view of the facts as above outlined, and upon the authority of *Anderson v. United States* (see also *Lustig v. United States*), the determinations of the courts below should be reversed.

C

The Arrest of Petitioner on January 10, 1957 On Suspicion Was in Violation of the Statute of New York State and, Therefore, Illegal. Failure to Arraign Defendant on January 10, 1957 Violated the Statutory Law of New York.

Section 177 of the Code of Criminal Procedure (1) provides that a peace officer may arrest, without a warrant "for a crime committed or attempted in his presence, (2)

when the person arrested has committed a felony, although not in his presence, and (3) when a felony has been committed, and he has reasonable cause for believing the person to be arrested to have committed it."

Section 165 of the same Code provides that a defendant must in all cases be taken before a magistrate without unnecessary delay.

The record in this case indisputably shows that on January 10, 1957 the local police had no warrant for the petitioner's arrest (Tr. 97); that there was no crime committed in their presence; that the arrest was made on the basis of suspicion, and he was being held on suspicion (Tr. 95, 98).

The record further reveals that, although petitioner was taken into custody on January 10, 1957, between 9:30 and 9:45 o'clock A. M., no charge was placed against petitioner by the local police until 1:00 P. M. on January 11, 1957 and that petitioner was arraigned shortly after the charge was placed against him in the City Court of Buffalo on January 11, 1957 at 2:00 P. M. (Tr. 75-80).

There should be no question from the above that the arrest of the petitioner was illegal and the detention of the petitioner was also illegal, inasmuch as the City Court of Buffalo was in session throughout January 10, 1957 and no attempt was made to arraign petitioner until the following day. The wilful violation by the police of Section 165 of the New York Criminal Code, calling for prompt arraignment, is a crime. Penal Law, § 1841. Such violations have been sufficient cause for reversal of convictions in New York. *People v. Mummian*, 258 N. Y. 394; *People v. Lovello*, 1 N. Y. 2d 436, 154 N. Y. S. 2d 8.

In *People v. Lovello (supra)*, the defendant was arrested on a Saturday night and was not arraigned until the following Monday. The Court, after expressing its opinion that there was no dispute as to the sufficiency of the prosecution's proof, said at page 9 (Supp. edition):

> "He was not arraigned until Monday morning although to the knowledge of the officers a court in which he could have been arraigned was open on Sunday. The delay in arraignment was illegal."

POINT II

Even in the absence of a so-called "working arrangement" between the State and Federal officers, the oral and written statements (Government's Exhibit 43) taken from petitioner by agents of the Federal Bureau of Investigation while petitioner was being illegally detained without arraignment in violation of Section 165 of the New York State Code of Criminal Procedure, should not have been received in evidence against him, and in receiving it the Trial Court committed reversible error.

In Point I, above, we have endeavored to show that there was, in fact, a "working arrangement" between the local authorities and the local office of the Federal Bureau of Investigation as would bring the instant case squarely within the rule promulgated by this Court in the *McNabb* and *Anderson* cases and, therefore, make the admission in evidence of petitioner's "confessions" reversible error. We wish to go one step further. Assuming, for the sake of argument, that the record does not disclose facts pointing to the existence of such a "working arrangement", petitioner respectfully urges that the rule of the *McNabb* and *Anderson* cases should be extended to prevent Federal law enforcement officers from taking ad-

vantage of illegal detentions of suspected federal offenders by State officers in order to secure confessions which, if the illegal detention had been at their own hands, would be inadmissible in evidence. Such an extension of the *McNabb* and *Anderson* rule would seem to be consistent with the policies of this Court in the so-called "search and seizure cases", *viz*:

In *Weeks v. U. S.*, 232 U. S. 383; 34 S. Ct. 341, this Court held that evidence obtained by Federal officers as a result of illegal search and seizures would not be admitted against the defendant in Federal prosecutions. In arriving at this determination, the Court coincidentally found that unreasonable search and seizures by State officers did not come within the protection afforded by the Fourth Amendment to the United States Constitution.

Later, in *Byars v. U. S.*, 273 U. S. 28; 47 S. Ct. 248, the rule of the *Weeks* case was extended to provide that evidence obtained as a result of an unlawful search and seizure by State officers was inadmissible in Federal prosecutions if Federal officers had participated in the unlawful search and seizure to the point that it had become a joint State and Federal operation, or, in other words, if the Federal officers "had a hand in it." See *Lustig v. U. S.*, 338 U. S. 74; 69 S. Ct. 1372. For many years thereafter our Federal District Courts operated under the rule that illegally obtained evidence by State officers was admissible in Federal trials provided Federal officers did not "have a hand" in its acquisition.

But then in *Wolf v. Colorado*, 338 U. S. 25; 69 S. Ct. 1359, this Court decided that so much of the *Weeks* case as held that illegal search and seizures by State officers did not offend the Fourth Amendment demanded recon-

sideration. A majority of the Court held that henceforth an invasion of a person's Constitutional rights by State officers would be considered in the same light as though committed by Federal officers, in so far as Federal prosecutions are concerned.

We then come to *Elkins v. U. S.*, 364 U. S. 206; 80 S. Ct. 1437, in which this Court for the first time expressly declared that the so-called "silver platter" doctrine referred to in the *Lustig* case was no longer acceptable. It held that since evidence obtained by State officers as a result of an illegal search and seizure constituted an invasion of a defendant's Constitutional rights, such evidence was no longer admissible in Federal prosecutions despite the fact that there had been no participation in such illegal search and siezure by Federal officers.

True, the *Weeks, Byars, Wolf* and *Elkins* cases dealt with illegal search and seizures and not confessions obtained during illegal detentions such as the case at bar. Nevertheless they exhibit a policy, we think, which frowns upon lawless law enforcement and have their counterparts in cases dealing with illegally obtained confessions.

For instance, the *Weeks* case has its counterpart in *McNabb v. U. S.*, 318 U. S. 332; 63 S. Ct. 608, which held that confessions obtained by Federal officers during the illegal detention of a defendant in violation of Rule 5a of the Federal Rules of Criminal Procedure, were inadmissible in Federal prosecutions.

The *McNabb* rule, like the *Weeks* rule, was extended in *Anderson v. U. S.*, 318 U. S. 350; 63 S. Ct. 599, which is the counterpart of the *Byars* case. In the *Anderson* case, this Court held that confessions obtained by Federal officers while a defendant was being illegally held without

arraignment by State officers under a working arrangement with Federal officers, were inadmissible in Federal prosecutions.

Unless the *McNabb* rule is extended to the point that the *Weeks* rule was in the *Elkins* case, over-zealous Federal law enforcement officers can still circumvent the mandate of Congress as it is embodied in Rule 5a and the principles set forth in the *McNabb* and *Anderson* cases, by the simple device used in the instant case of alerting the local authorities to some supposed past or contemplated violation of the State law and then reaping the benefits provided by the State officials' apprehension and detention of the suspect. No clearer case of circumvention can be imagined than the instant one.

As outlined in Point I above, we have the admission of John A. Roche, the Special Agent in charge of the local office of the Federal Bureau of Investigation, that petitioner had been a suspect in both bank hold-ups for many months prior to his apprehension by the Buffalo police on January 10, 1957; that on January 7, 1957 he contacted Buffalo Chief of Detectives Golombeck and informed him of Coppola's part in the hold-up on January 4, 1957. On January 9, 1957 Roche again called Golombeck and told him of information in his possession indicating that Coppola planned a hold-up of a local tavern on January 10, 1957 at about 10:00 A. M.

On January 10, 1957, at about 11:00 A. M., Golombeck called Roche and told Roche that he had Coppola in custody and was on his way to police headquarters. Roche testified that he went to police headquarters shortly before noon on January 10, 1957 and that he questioned Coppola about the M & T bank robbery, and asked permission to

search his home; that he later assigned two agents to question Coppola later that evening. Roche also admitted that he had informed Erie County District Attorney John Dwyer of Coppola's suspected participation in the bank hold-ups on January 9, 1957 and that Dwyer was with him on the afternoon of January 10, 1957 when he questioned Coppola in police headquarters (Tr. 106-110). As was pointed out before, Coppola's oral and written confessions (Government's Exhibit 43) were obtained while he was being illegally detained following an unlawful arrest (Point I, sub. "C").

Considering the circumstances set forth above, it requires no stretch of the imagination to see just what tactics were used by the Government's agents to circumvent the mandates of Rule 5a. Realizing that any confession obtained during an illegal detention of petitioner by themselves or through a working arrangement with the local police would be inadmissible in a Federal prosecution, the Government agent bided his time until he could give the local police what the local police considered sufficient excuse to apprehend and detain petitioner on suspicion. Then, while the local authorities obligingly detained petitioner in violation of his rights, the agents of the F. B. I. pounced upon the situation that they had at least indirectly created to question petitioner and secure a confession from him. Such circumvention of the Federal rules should not be condoned or tolerated.

It makes no difference to a defendant whether he is being illegally detained in violation of his rights by local or Federal authorities. This Court has rejected confessions obtained from a defendant while he is being illegally detained by Federal officers themselves (*McNabb v. U. S., supra*) or by local authorities in co-operation with Federal au-

thorities (*Anderson v. U. S., supra*). There seems to be no good reason why a distinction should not be made between confessions obtained under those circumstances and one obtained by Federal agents while a defendant is being illegally detained in the technical custody of State officers under circumstances which don't quite show the existence of a so-called working arrangement between local and Federal officials. This seems particularly true where, as here, it clearly appears that the Federal authorities are at least indirectly responsible for the petitioner's initial apprehension by the local police.

It is hard to conceive why the absence of a "working arrangement" between local and Federal authorities should make a defendant's detention any less illegal or his confession any less tainted by his illegal detention. The absence of participation by Federal authorities in petitioner's illegal detention does not change the net result any more than the non-participation by Federal authorities in the illegal search and seizures changed the net result in the *Elkins* case, *i.e.*, in both cases evidence which had been obtained in violation of the defendant's rights had been used to convict him.

It is true that the *Elkins* case involved a violation of a Constitutional right and the instant case involves a violation of a statutory right. But fair play in the prosecution of Federal criminal cases recognizes no such distinction. This is evidenced by the decisions of this Court in the *McNabb* and *Anderson* cases. If the contrary were true, this Court might well have decided in those cases that an illegal detention, by and of itself, was no reason for throwing out a confession but merely a factor to be considered in determining whether or not a confession was coerced.

But as we know, this Court decided otherwise and thereby established the rule that fair play dictates that confessions obtained during an illegal detention of a defendant will not be received in Federal prosecutions for that reason alone and even in the absence of coercion. Unless the *McNabb* and *Anderson* cases are extended to hold that confessions obtained by Federal officers while a defendant is being illegally detained by local police are inadmissible in Federal prosecutions, the very principle behind those cases will be defeated. This is true because it will leave available to over-anxious Federal law enforcement agents a device whereby they can circumvent the clear mandate of Congress as embodied in Rule 5a and the principle behind those decisions of this Court.

No one can seriously argue that Agent Roche did not have a duty to inform the local police of information in his possession indicating that petitioner and others had planned a hold-up to be staged on the morning of January 10, 1957, for indeed he did. However, this does not negative the fact that Agent Roche might well have had, as we believe he did, a second less meritorious motive in imparting the information to Chief Golombeck, *viz.*: the creation of the circumstance whereby the petitioner would be apprehended and detained by local authorities on their own business and thus affording to Roche the opportunity to question petitioner under circumstances which did not carry with them the stigma of a "working arrangement".

But Roche's declared motive in advising the local police of the anticipated hold-up by petitioner is not the determining factor. The vice lies in the fact that Roche used the unlawful detention of petitioner by the local authorities as a means of securing a confession from petitioner which would have been useless to him if the detention had been

his or accomplished with his co-operation. The device used is obvious and should not be permitted.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgments of the Courts below should be reversed and new trials ordered.

Respectfully submitted,

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